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Supreme Court, U.S.
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In The

Supreme Court of the United States

P. CHARLES SCHWENDER,

Petitioner,

vs.

DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Should the Petition for a Writ of Certiorari be granted to address the issue of whether petitioner was denied due process when he was discharged as a government employee and the pretermination hearing officer was the same individual who proposed, investigated, and prosecuted the action, and that hearing officer communicated *ex parte* with the deciding official after the pretermination hearing?

2. Should the Petition for a Writ of Certiorari be granted to address the issue of whether petitioner was denied due process when he was discharged as a government employee and the pretermination "hearing" did not provide a sufficient mechanism to dispute the factual allegations of wrongdoing, particularly when the allegations involved issues of credibility?

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JURISDICTIONAL STATEMENT

The decision sought to be reviewed was rendered on April 29, 1985, by the United States Court of Appeals for the Federal Circuit. On June 25, 1985, the Chief Justice signed an Order extending petitioner's time to file a Petition for Writ of Certiorari to August 27, 1985. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 8 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment

STATUTES

5 U.S.C. § 554(d)(1)
5 U.S.C. § 7513(b)(2)
5 U.S.C. § 7701(c)(1)(B)
5 U.S.C. § 7701(c)(2)(A)
5 U.S.C. § 7703(c)

REGULATIONS

5 C.F.R. § 752.404(c)(2)
5 C.F.R. § 752.404(f)
5 C.F.R. § 1201.56(c)(3)

(The foregoing constitutional provisions, statutes, and regulations are set forth in the Appendix.)

STATEMENT OF THE CASE

Petitioner, P. Charles Schwender, had been employed by the Occupational Safety and Health Administration since 1971. At the time of his removal, petitioner held the position of Safety and

Health Manager (Area Director) of OSHA's Area Office located in Albany, New York. Previously, he served as Area Director of the Agency's Buffalo Area Office.

By letter dated February 11, 1981, the Agency's New York Regional Administrator, F ger Clark, gave notice of proposed adverse action against petitioner, i.e., that he be removed from his position as Area Director of the Albany area office, and from the Federal service (App. 50-54).* The reasons given as the basis for the proposed discharge focused on erroneous entries allegedly made on a time card covering appellant's duty and/or leave status for December 11 and 12, 1980, and upon statements made in connection with these entries during an interview with Roger Clark on January 27, 1981. The charges were based in large part on Clark's written report of that interview (App. 73-76).

The agency directed petitioner's counsel to submit any written or oral reply to Clark, the same official who had investigated and proposed the charges against petitioner. Petitioner's counsel promptly protested the Agency's designation of Clark as oral reply officer (App. 55-56), but his objections were not sustained. Thereafter, petitioner proceeded through counsel to submit his written reply and to make an oral presentation before Clark, again raising a strenuous objection to the Agency's designation of the investigator of the specific charges at issue as the recipient of the oral reply (App. 55-56, 64-65, 92). At various points in the oral reply, petitioner's counsel attempted to draw attention to Clark's own misunderstandings, misinterpretations, or errors in recollection of his January 27, 1981 interview with petitioner, challenging Clark's credibility on matters central to the case against petitioner (App. 80, 82, 83-89, 98-99). The record of the oral reply hearing was forwarded for decision to the Agency's de-

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* Numbers in parenthesis preceded by "App." indicate page references to the Appendix.

ciding official, John Miles, OSHA Field Coordinator in Washington, D.C., together with petitioner's procedural objections to the proceedings up to this point.

Miles never rendered a decision on the February 11 charges. Instead, apparently through *ex parte* communications with Clark — of which petitioner was never notified, nor was he given any opportunity to respond — Miles directed a reopening of the investigation for "clarification of events" (App. 120-121). Over the continuing protests of petitioner's counsel, Clark served on petitioner an amended notice of proposed adverse action based on his further investigation of the charges, together with what were presumably intended to be affidavits of certain Agency employees, including Clark himself (App. 102-105). Petitioner's counsel declined the invitation to make a second oral reply directly before petitioner's accuser, Clark, and instead submitted an extensive written reply dated July 2, 1981, in which, in addition to answering the merits of the charges, he raised numerous procedural irregularities and errors which violated petitioner's procedural due process rights and denied petitioner a reasonable opportunity to present his defense (App. 108-124).

By decision dated July 31, 1981, the Agency's deciding official, Miles, rejected all of petitioner's claims of harmful procedural error, resolved all crucial issues of credibility in favor of Clark, and upheld the charges in their entirety (App. 5-23), thereby dismissing petitioner from government service for making errors in completing a single time card.

Petitioner timely filed an appeal from the Agency's decision with the New York Regional Office of the MSPB, and a hearing was held before Joseph K. Riotto, presiding official, on November 17 and 18, 1981. By decision dated December 21, 1981, the presiding official sustained the Agency's action (App. 24-42). A petition for review was filed with the Board on or about January 23, 1982, specifying various exceptions to the presiding official's decision, including petitioner's procedural objections to the mul-

tiple roles played by oral reply officer Clark and the extensive *ex parte* communications between Clark and the Agency's deciding official, as disclosed during the hearing before the MSPB's presiding official.

By decision dated February 23, 1984, the Board denied the petition for review (App. 43-47) and rejected petitioner's procedural objections, finding that "the agency complied with all relevant statutory and regulatory requirements . . . " (App. 43-44).

Pursuant to 5 U.S.C. § 7703, petitioner sought judicial review of the foregoing decision. By decision dated April 29, 1985, the United States Court of Appeals for the Federal Circuit affirmed the Board's decision denying review of the presiding official's decision sustaining petitioner's removal from the Department of Labor. The Court, addressing petitioner's due process arguments, found that "the Board correctly held that petitioner's allegations of procedural error were without legal basis" (App. 48-49).

POINT I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE PRETERMINATION "HEARING" FAILED TO SATISFY THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In *Cleveland Board of Education v. Loudermill*, ____ U.S. ____, 105 S.Ct. 1487 (March 19, 1985), this Court held that a pretermination hearing must be accorded a public employee who can be discharged only for cause. However, the Court did not define what type of hearing was necessary to satisfy due process requirements. Rather, the Court stated that a full evidentiary hearing was not required, and — based on the relief requested by the discharged employee, and in the context of that particular case —

held that the employee is entitled to notice of the charges, an explanation of the employer's evidence and an opportunity to present his side of the story.

Unlike *Loudermill* — where the Ohio statute in question failed to provide for any pretermination notice or hearing — petitioner here was notified of the charges and a pretermination "hearing" was held. However, the hearing was constituted and conducted in a manner that was so fundamentally unfair that it denied petitioner a true opportunity to present his side of the story, thereby denying petitioner due process of law.

The pretermination "hearing" afforded to petitioner was defective in two fundamental respects which, taken together, leave no doubt that the procedure was constitutionally infirm: (1) petitioner was denied the opportunity to make his oral and written replies before an impartial Agency official, being forced instead to appear before the very individual who proposed, investigated, and prosecuted the adverse action; and (2) both Roger Clark and the Agency's deciding official admitted at the MSPB hearing that they had engaged in extensive *ex parte* communications, without giving notice to petitioner or an opportunity to be heard, during which Clark urged that the deciding official determine critical factual issues of credibility in Clark's favor, and that he disbelieve petitioner's testimony on those issues.

There can be no question that the above-described procedural errors are "harmful" within the meaning of the statute, the MSPB's implementing regulations, and case law precedents. *See* 5 U.S.C. § 7701(c)(2)(A) (1982); 5 C.F.R. § 1201.56(c)(3) (1982); *Shaw v. United States Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983). As recently observed by this Court, harmful procedural error is "error that causes substantial prejudice to [an employee's] individual rights by possibly affecting the Agency's decision." *Cornelius v. Nutt*, ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 4837 (June 24, 1985). Had petitioner been permitted to present his oral and written replies to a disinterested official who

could have made his recommendations to the Agency's deciding official without thereby placing his own truthfulness and credibility on the line, the outcome before the Agency may well have been different.

A. Due Process Entitled Petitioner to Appear Before an Impartial Oral Reply Officer, Not Before the Agency Official Who Proposed, Investigated and Prosecuted the Adverse Action.

The record in this case reveals beyond any question the extensive personal interest and involvement of Roger Clark in these proceedings, and indeed his persistence in seeking the removal of petitioner, based on his own investigations and conversations (more aptly characterized as "interrogations") with petitioner and other Agency employees. Clark himself initiated the adverse action based on his own covert observations of petitioner in New York City. Thereafter, he conducted an investigation to gather evidence to support his suspicions of impropriety. Clark then prepared the four specifications setting forth the reasons for the proposed removal of petitioner, two of which are based almost exclusively on so-called false statements allegedly made to Clark during his interview with petitioner on January 27, 1981. Over the strenuous objections of counsel (App. 55-56, 98-99), petitioner was required to direct his oral reply to Clark, wherein counsel in presenting petitioner's defense on crucial factual issues was placed in the untenable situation of having to attack the credibility, reliability, and recollection of statements made by the oral reply officer himself! Clark, too, was in an untenable position, requiring him to make recommendations to the ultimate decision maker on questions of fact turning on his own credibility and reliability as a witness to the crucial events.

Clark's involvement, already too extensive to guarantee his continued impartiality, did not stop there, however. Apparently at the insistence of the deciding official, Clark proceeded to take

advantage of the disclosure of petitioner's defenses made to him at the oral reply to conduct a further investigation, and to amend the charges and specifications so as to shore up weaknesses in the Agency's case against petitioner. Again, over petitioner's objections (App. 118-121, 122-124), Clark was designated as the oral reply officer to hear petitioner's response to the latest specifications, but counsel for petitioner declined the invitation to participate in yet another exercise in futility and submitted only a written response to the amended charges.

The foregoing proceedings were plainly improper and destroyed the very purpose behind the requirement of an oral reply. As the Court of Claims stated in *Washington v. United States*, 147 F.Supp. 284 (Ct.Cl.), *cert. dismissed*, 355 U.S. 801 (1957), Congress in granting the right to an oral reply must have intended that the employee have a chance of success in establishing matters in defense or mitigation. "The naked facts, without the personal appeal, could be just as well stated in writing." 147 F.Supp. at 288. Because of Clark's involvement as complaining witness, investigator, and prosecutor, it is clear that petitioner had no chance of success whatsoever in establishing his factual defenses at the oral reply.

The case of *Paterson v. United States*, 319 F.2d 882 (Ct.Cl. 1963), constitutes direct authority that the agency's procedures undermined the fundamental fairness of the pretermination reply. The employee in *Paterson* had been interviewed by two postal inspectors, who later investigated and prepared the charges against him. His request to make a personal appeal to his operations supervisor was denied, and he was allowed only to make an appearance before the two inspectors. The Court of Claims overturned his dismissal, holding that the right to a personal appeal "is not met by an appearance before investigators charged with the duty to develop the facts to substantiate the charges they, themselves, have drawn up", 319 F.2d at 884, particularly where they were not supervisors of the employee being charged. The

Court could think of "no surer way to destroy the intended effect of the personal appeal" than to have the investigator himself draw up charges, comment on the employee's answer to the charges, and then conduct the oral reply afforded the employee under the statute. *Id.*, 319 F.2d at 885. That is precisely what happened in this case, albeit the investigator and primary witness against petitioner also happened to be his superior in the Agency chain of command.

The fact that Clark was petitioner's superior in no way mitigates the unfairness of his multiple roles in this proceeding. Several years after the decision in Paterson, the Court of Claims criticized as "questionable", in a case involving the discharge of an employee on the grounds of "making malicious statements against his immediate superior", the fact that the immediate superior himself had signed the notice as charging party and had phrased the accompanying letter in first-person terms. "In a case involving the writer's personal interests so directly and strongly, this was an insensitive practice which could better have been avoided. Cf. *Offutt v. United States*, 348 U.S. 11 (1954). Perhaps if another official had had the responsibility of deciding whether to proceed formally against plaintiff, and of framing the notice of charges, this matter would have taken a different course." *Burkett v. United States*, 402 F.2d 1002 (Ct.Cl. 1968). Certainly the same must be said of this proceeding, in which Clark, with an obvious and significant personal interest in the outcome, not only made the initial decision to proceed against petitioner and framed the notice of charges, but sat to hear petitioner's oral reply, amended the charges as a result of further investigation to meet matters contained in petitioner's defense, and transmitted the record to John Miles together with Clark's *ex parte* credibility recommendations. The inference of prejudicial bias against petitioner is compelling.

While the decisions in *Paterson* and *Burkett* rested primarily on statutory grounds, the requirement of an impartial decision

maker has constitutional underpinnings. It is well established that the probability of bias on the part of a decision maker may be too great to be constitutionally tolerable, when he has been the target of criticism by the party before him. *Taylor v. Hayes*, 418 U.S. 488, 501-03 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Pickering v. Board of Education*, 391 U.S. 563, 578-579 n. 2 (1968). In this case, Clark's credibility and even his reputation for integrity and truthfulness were, of necessity, impugned by petitioner in the course of relating his own version of the conversations with Clark which underlie the charges. With his personal integrity at stake, Clark was in no position to hear petitioner's oral reply and objectively assess this case for recommendation to the decision maker. See *Arnett v. Kennedy*, 416 U.S. 134, 196-200 (dissenting opinion of Justice White).

Clearly, Mr. Clark should not have been permitted to act as complaining witness, investigator, and prosecutor of petitioner, without the Agency designating someone else to act in the impartial role of oral reply officer. This departure from the statutory mandate violates the constitutional principles set forth in *In re Murchison*, 349 U.S. 133 (1955). There the Supreme Court struck down the contempt convictions of witnesses who had refused to answer questions during an interrogation by a "one-man grand jury", and who were subsequently tried in open court before the same individual acting as a judge. The Court held that trial before the judge who was at the same time the "complainant, indicter and prosecutor" violated the due process requirement of an impartial tribunal. Having taken an active part in the accusatory process, the judge could no longer be wholly disinterested in the conviction or acquittal of those accused. Furthermore, the Court relied heavily on the fact that at the contempt trial, "the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room" when he had conducted his interrogation of the witnesses.

The dual or perhaps triple role of the trial judge presented the astonishing spectacle of the judge himself "presenting testimony upon which he must finally pass in determining the guilt or innocence" of the accused. *Id.*, 249 U.S. at 139.

Such is precisely the spectacle which these administrative proceedings present and which has resulted in irreparable prejudice to petitioner. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (requirements of due process were not met by the review of a welfare termination decision by the caseworker who was, in effect, also the complainant); *Morrisey v. Brewer*, 408 U.S. 471, 486 (1972) (an independent decision maker must determine whether reasonable grounds exist for parole revocation because the "officer directly involved in making recommendations cannot always have complete objectivity in evaluating them"). Permitting Clark to act as oral reply officer when the charges were investigated and specifications drawn up by him, and particularly when they were based largely on "false statements" revealed as such only by Clark's own version of his conversations with petitioner, was a serious breach of due process warranting correction by this Court.

B. The Oral Reply Officer's Recommendations to the Deciding Official Constituted Improper *Ex Parte* Communications By a "Non-Disinterested Adversary" of Petitioner.

It has been held that "the purpose of an oral reply . . . would be thwarted absent a power of meaningful recommendation of disposition vested in the individual who personally meets with the employee." *Polcover v. Secretary of the Treasury*, 477 F.2d 1223, 1236 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973).

Because of Clark's extensive personal involvement in the Agency proceedings, any "recommendations" he may have made to Miles were, in a very real sense, *ex parte* communications to the decision maker by an adversary without affording petitioner the necessary opportunity to reply. Cf. Administrative Procedure

Act, 5 U.S.C. 8 554(d)(1) ("The employee who presides at the reception of evidence . . . may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate"). Clark's "recommendations" amounted to nothing less than "self-serving contact[s] initiated by an interested party to add to its factual evidence or to proffer further justification for its actions after the record should have been closed." *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977). It was manifestly improper, therefore, for Clark to have communicated privately with Miles concerning the crucial factual issues upon which his own credibility and truthfulness vis-a-vis petitioner's would be determined.* Not surprisingly, these credibility issues were without exception resolved in Clark's favor. The Agency's pretermination decision was thus the product of a grave impairment of petitioner's due process rights.

Clark and Miles freely admitted on cross examination that they had engaged in extensive *ex parte* discussions of the evidence supporting the charges against petitioner from the outset of the Agency's removal proceedings. In January 1981, Clark telephoned Miles to advise him that he would be visiting the Albany Area Office to investigate a case involving the Area Director (App. 135-136). Prior to Clark's actual preparation of the proposed adverse action, he again discussed his investigation with Miles (App. 125, 136-137). After receiving petitioner's oral reply and written response, Clark made his initial recommendation to Miles, in which he urged the deciding official to credit Clark's version of his January 27, 1981 conversation with petitioner and to disbelieve petitioner's recollection:

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* The fact that Clark was legally disabled from making any meaningful recommendation to the Agency's deciding official only confirms once more that he was not a proper official to receive the oral reply. The Agency's dilemma is self-imposed, because the duty to receive the oral reply and make a meaningful recommendation could have been delegated by Clark to a subordinate "line" or "staff" officer. See *Ricucci v. United States*, 425 F.2d 1252, 1255-56 (Ct. Cl. 1970).

> "[It] was quite clear to me that [petitioner] told me that he should have been on annual leave, and I saw nothing other than a changing of that story, saw nothing other than a fabrication in the case." (App. 121-122).*

Acknowledging the evident weaknesses in the Agency's case — conveniently pointed out to Clark in petitioner's oral reply and written response (App. 140) — Miles directed Clark to obtain affidavits from several employees in the Albany Area Office and to prepare a second set of reasons and specifications in support of the proposed adverse action (App. 138-140).

On cross examination, Clark testified that he discussed his original recommendations with Miles "at length," "in detail," and "back and forth" — although he provided no specifics as to their conversations (App. 127-130). After petitioner had submitted his written response to the second set of specifications, Clark again had "several different conversations" with Miles during which he recommended, as before, that the charges against petitioner be sustained (App. 130-131).

Significantly, Clark had no recollection of discussing with Miles a number of factual conflicts in the employees' statements that tended to support petitioner's recollection of events (App. 133-134); nor could he recollect advising Miles that petitioner had indeed mentioned his dental problems to Clark during their conversation in the Albany Area Office on January 27, 1981 (App. 132-134); nor could he recollect advising Miles of the circumstances surrounding petitioner's purchase of an airline ticket from New York to Buffalo on December 5, 1980 (App. 133-134); nor could he recollect discussing with Miles the time period that had

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* Although Miles was thus advised that the charges involved a credibility determination as between petitioner and Clark, Miles testified that he saw no reason to appoint someone other than Clark as oral reply officer, because Clark "was taking the response, to hear the case as my representative . . . [T]o me it was as if I was there" (App. 137-138). Of course, it was not "as if [Miles] was there," since Clark, unlike Miles, had a direct personal interest in the deciding official's resolution of credibility issues.

elapsed between petitioner's discussion of the amended time card with his timekeeper and petitioner's signing of the time card (App. 132-133). These omissions are not surprising, given the role Clark played in the proceedings, and given the natural human tendency to seek to discredit the truthfulness of one's adversary; but they proved to be extremely prejudicial to petitioner, since their omission not only influenced the deciding official's assessment of petitioner's credibility, but also led to several plainly erroneous factual findings for which there was no supporting evidence — substantial or otherwise — in the record before the deciding official.

Under the case law precedents of the Court of Appeals for the Federal Circuit and of its predecessor, the Court of Claims, the foregoing harmful *ex parte* communications between the Agency's presiding official and petitioner's adversary violated petitioner's due process rights and rendered the Agency's removal proceedings against him constitutionally invalid.

In *Sullivan v. Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983), the Federal Circuit Court of Appeals overturned a decision of the agency that removed the petitioner from his position on grounds that he had submitted false time sheets on six specified dates. The Court held that improper *ex parte* communications made to the agency's deciding official by petitioner's superior, who had initiated the investigation, were "not only unfair, but also denied petitioner his rights under the due process clause of the Constitution"; and that these improper contacts "tainted the investigation, voided the entire proceeding, and rendered [the agency's] decision a nullity." 720 F.2d at 1274. The petitioner was ordered reinstated to his position with full back pay and benefits.

The facts in *Sullivan* closely parallel this case. The commanding officer of petitioner's agency, Captain Westbrock, had commenced an investigation into possible discrepancies between the petitioner's time sheets and his actual hours worked. Having decided to bring charges against petitioner for filing false claims,

Westbrock delegated the actual preparation of the charges to a subordinate. Westbrock continued "actively participating in the case up to and including the day of the hearing on petitioner's oral and written response to the charges," 720 F.2d at 1269, by hearing and deciding various motions presented by the petitioner.

In *Sullivan*, however, a different official was appointed by the agency to hear petitioner's oral response to the charges. Here, the Agency was so oblivious to the standards of due process that it appointed petitioner's adversary, Roger Clark, as the official to receive petitioner's oral and written replies. This would be analogous to having Westbrock hear the petitioner's oral reply in *Sullivan*, thus compounding the procedural error present in this case.

After the recommendation of the oral reply officer had been forwarded to the deciding official, Westbrock repeatedly communicated with the deciding official (and his aides) to urge that petitioner be removed. The deciding official ordered the petitioner's removal, whereupon petitioner unsuccessfully appealed to the Field Office of the Merit Systems Protection Board, which held a full adversary hearing, and thence to the Board in Washington, which denied the petition for review.

The *Sullivan* decision is, in all material respects, indistinguishable from this case. If anything, the conduct of Agency officials throughout this proceeding demonstrates a more serious breach of the standards of due process and a more compelling case for relief than *Sullivan*. In both cases, *ex parte* communications were made to the Agency's deciding official — prior to any evidentiary hearing — by a superior official shown to be petitioner's adversary, thereby tainting the removal proceedings with unfairness and vitiating petitioner's removal. The decision of the Federal Circuit in this case is plainly in conflict with its holding in *Sullivan* and with the cases relied on in that decision.

In *Sullivan*, the respondent argued that even if the *ex parte* communications were improper, their occurrence constituted

mere harmless error because the petitioner had the opportunity to present the issue, in the context of a full adversary hearing, to the Merit Systems Protection Board on appeal. The Federal Circuit decisively rejected this argument, pointing out that the error is committed when *ex parte* statements are made to the first official with authority to decide the case in favor of the employee.

The Federal Circuit in *Sullivan* also rejected the respondent's argument that improper *ex parte* communications to the deciding official made "absolutely no difference" because the evidence supported the petitioner's removal in any event, regardless of the tainted communications. The Court held that due to the seriousness of such a procedural defect, the substantive merits of the adverse action are to be wholly disregarded.

Similarly, in *Camero v. United States*, 375 F.2d 777 (Ct.Cl. 1967), the Court of Claims found that *ex parte* communications to the decision maker by a person with "more than a neutral stake" in the outcome of an adverse action were inconsistent with the standards of fairness implicit in the agency's hearing procedures. The same result was reached in a previous case before the Court of Claims, *Ryder v. United States*, 585 F.2d 482 (Ct. Cl. 1978), which involved *ex parte* communications to the decision maker from an important witness against the plaintiff. The Court of Claims struck down the plaintiff's removal as violative of the principles of due process applied in *Camero*.

Sullivan and the other cases cited above are squarely applicable to this case. The Merit Systems Protection Board's assertion that Clark was not a "non-disinterested adversary," (App. 43-44), thereby supposedly distinguishing the Sullivan case, is remarkably naive. Clark's credibility vis-a-vis petitioner's lies at the very heart of the charges against petitioner. Indeed, if only because Clark has an obvious and compelling personal interest in having his own testimony credited and petitioner's testimony discredited, his role is far more "adversarial" than the employee's superior in

Sullivan (who initiated the investigation against the petitioner and recommended that charges be brought against him, but who did not prepare the charges or testify against the petitioner himself).

In summary, these cases teach that an employee facing removal from government service is entitled to have the Agency's deciding official decide the case without the taint of improper *ex parte* communications. The analysis is a constitutional one, and the rights protected are implicit in the concept of procedural due process.

This Court, in the *Loudermill* case, reaffirmed that due process requires the government to afford a hearing to an employee prior to his removal. Here, however, the pretermination "hearing" was constituted and conducted in such a manner that the due process right to present the employee's side of the story was stripped of all meaning, thereby rendering petitioner's written and oral replies nothing more than an exercise in futility.

While the Court has held that the pretermination hearing need not be elaborate, it must still comport with the fundamental principles of fairness. Whether the pretermination "hearing" in this case complied with minimum procedural due process requirements is an issue not presented in *Loudermill* and one that, obviously, will continue to recur in employment discharge cases. The Court is respectfully urged to grant the Petition for Writ of Certiorari to consider this important constitutional issue.

POINT II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS AN IMPORTANT ISSUE NOT DECIDED BY THE COURT IN *CLEVELAND BOARD OF EDUCATION V. LOUDERMILL*.

The Court's decision in *Loudermill*, that a pretermination hearing must be accorded a public employee who can be discharged only for cause, established a basic due process founda-

tion in tenured public employment discharge cases. However, the decision was limited by the facts of that case. There, Loudermill was hired as a security guard and, as part of his job application, stated that he had never been convicted of a felony. Upon discovering that the statement was not true, the Board summarily dismissed Loudermill because of his dishonesty in completing the employment application. Loudermill did not dispute the fact that he had been convicted of a felony, but argued that he was entitled to a hearing prior to termination where he would have explained that he thought his conviction was for a misdemeanor. The Court agreed that some type of hearing was required to permit the employee to proffer his explanation. Since no hearing was conducted, the Court had no opportunity to evaluate its fairness, nor was it called upon to formulate a more precise standard with respect to the pretermination hearing.

Both Justice Brennan, concurring and dissenting, and Justice Rehnquist, dissenting, noted that the Court's opinion set forth no definite standards for the conduct of a pretermination hearing. ___ U.S. ___, ___, ___, 105 S.Ct. 1487, 1499, 1504. Justice Brennan further noted that *Loudermill*, and its companion case, did not involve *factual* disputes, but rather whether the employees were entitled to an opportunity to present a plausible argument to prevent their discharge. Justice Brennan reasoned that "when factual disputes are involved . . . an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser *in front of the decision maker.*" ___ U.S. ___, ___, 105 S.Ct. at 1499 (emphasis supplied). This Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976), recognized that a factor in evaluating the fairness of a pretermination proceeding is whether the inquiry focuses on objective facts or on the credibility and veracity of witnesses. *Id.* at 343-344. The D.C. Circuit Court of Appeals has observed that due process may require more than a mere "opportunity to explain" where there is a factual dispute in an employment dis-

charge case. *Wehner v. Levi*, 562 F.2d 1276, 1279, n.8 (D.C. Cir. 1977). Similarly, the Fifth Circuit Court of Appeals has held that due process requires an opportunity "to respond orally *before the official charged with the responsibility of making the termination decision.*" *Thurston v. Dekle*, 531 F.2d 1264, 1273 (5th Cir. 1976) (emphasis supplied).

Here, petitioner disputed the alleged facts underlying the proposal to discharge him from employment. The decision maker, who was not in attendance at the pretermination hearing, made factual determinations and resolved crucial issues of credibility against petitioner, all without petitioner being afforded a meaningful opportunity to present his side of the story directly to the decision maker.

Indeed, one of the factors the deciding official utilized to determine petitioner's credibility was the fact that he purchased an airline ticket from New York City to Buffalo (his residence) instead of Albany (his place of work), thereby evincing a prior intent to be absent from work the day of his sick leave (App. 13-14). However, at the post-discharge hearing, petitioner explained that he had purchased a New York City to Buffalo air ticket for the Friday in question because he was unsure whether he would be returning to Albany or Buffalo, and he took the Buffalo tickets because flights to that city were more likely to be filled to capacity, whereas if he decided to go to Albany, it would be easy to switch tickets. This explanation was supported by the testimony of an airline ticket agent who sold petitioner his tickets, and she stated that she advised him to make that type of travel arrangement (App. 30-31).

This one example demonstrates the inherent due process problems, and the danger of a wrongful discharge, when an employee is not granted a meaningful opportunity to present his defenses directly to the deciding official, especially when the allegations of wrongdoing involve issues of fact and credibility. The record of this case abounds with other similar examples, all resulting from

the Agency's insistence on placing petitioner's adversary, Roger Clark, in the role of intermediary between petitioner and the deciding official.

The Court should grant the Petition for a Writ of Certiorari to review the Agency's patent violation of petitioner's procedural due process rights. Furthermore, the Petition should be granted because the case at bar presents an excellent opportunity for the Court to address the issue, not presented in *Loudermill*, of the precise procedural standards applicable with respect to the conduct of a pretermination hearing when matters of fact and credibility are in dispute. Granting the Petition will enable the Court to provide needed guidance to the lower courts by more fully addressing the procedural due process issues inherent in tenured public employment discharge cases. The Court's decision will thus prevent the continued recurrence of this type of case, as predicted by Justice Rehnquist in his dissent in *Loudermill*, and will prevent needless litigation of other similar claims.

CONCLUSION

For all the foregoing reasons, the Court is respectfully requested to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

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